In the Provincial Court of Alberta

Citation: Savoie v. Alberta Union of Provincial Employees, 2012 ABPC 31

Date: 20120131
Docket: P1190302254
Registry: Edmonton

Between:

Richard John Savoie

Plaintiff

- and -

The Alberta Union of Provincial Employees

Defendant

Decision of the Honourable Judge L.D. Young

[1] The Defendant, through its counsel, brought an application for summary judgment pursuant to Rule 7.3(1)(b) of the *Alberta Rules of Court*, *Alberta Regulation 124/2010* (the *"Rules"*), to dismiss the Plaintiff's Civil Claim. This type of application is commonly referred to as a "summary dismissal" application. There is no specific provision for summary dismissal in the *Provincial Court Act*, R.S.A. 2000, c. P-31, (the *"Provincial Court Act"*), but pursuant to section 8(2) of the *Provincial Court Act*, "where [the] *Act* or the regulations do not provide for a specific practice or procedure of the Court that is necessary to ensure an expeditious and inexpensive resolution of a matter before the Court, the Court may, (a) apply the *Alberta Rules of Court*". The Plaintiff was served with notice of the application pursuant to an Order for Substitutional Service granted by this Court on November 29, 2011. The Plaintiff did not appear on the application nor did anyone appear on his behalf. Consequently, the only evidence before the Court on the application was the Affidavit of William Rigutto, sworn on November 2, 2011, on behalf of the Defendant, and filed in the within action on November 3, 2011 (the "Rigutto Affidavit").

[2] Rule 7.3 of the *Rules* reads, in part, as follows:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> . . .
>
> (b) there is no merit to a claim or part of it;

(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

(3) If the application is successful the Court may, with respect to all or part of a claim . . . do one or more of the following:

(a) dismiss one or more claims in the action . . .

[3] The Plaintiff filed his Civil Claim on April 4, 2011 (the "Claim"). The amount claimed was $411,500.00, although the Plaintiff abandoned that part of his Claim which exceeds the financial jurisdiction of this Court, which is $25,000.00. In his Claim, the Plaintiff alleges the following:

a. he has a "valid Power of Attorney from Mrs. Elaine Savoie [the Plaintiff's wife] for dealing with and persuing [sic] her interests related to the Alberta Union of Provincial Employees"; and

b. "the Union filed 4 grievances in early 2008 on behalf of Mrs. Savoie against her former employer; the University of Calgary. The grievances went unresolved and eventually in September 2009 the Union in deceit notified Mrs. Savoie in writing that the grievances would be taken to arbitration. As the arbitration date approached the Union neglected and refused to prepare for the arbitration hearings and attempted through coercion and intimidation to have Mrs. Savoie accept a low-ball offer of settlement or abandon her claim entirely. Mrs. Savoie refused to accept the offer and insisted on the arbitration hearing or a higher settlement offer. The Union then stated in writing they had no obligation to proceed with the arbitration and closed Mrs. Savoie's file. Complaints filed with the Alberta Labour Relations Board in April of 2008 and October of 2009 resulted in written decisions that Mrs. Savoie must seek a remedy through "common law"".

[4] The Defendant filed a Dispute Note in the within action on April 14, 2011, denying the allegations contained in the Claim and further defending the Plaintiff's Claim as follows:

a. denying that "the Plaintiff, has any standing to sue the Defendant, or that the Plaintiff has a valid Power of Attorney to deal with the Defendant on behalf of Elaine Savoie";

b. that "any claim that Elaine Savoie would have against the Defendant is statute barred by operation of the *Limitations of Actions Act* [sic], R.S.A. 2000 c. L-12";

c. that "Elaine Savoie is a former employee of the University of Calgary, and was represented for purposes of collective bargaining by AUPE. She was dismissed by the University of Calgary in 2007, and AUPE filed several grievances on her behalf in 2007. In April, 2008 the Plaintiff purporting to act on behalf of Elaine Savoie, filed a complaint with the Alberta Relations Board complaining of the Union's

conduct of the grievances. That complaint was dismissed by the Alberta Labour Relations Board by decision dated May 8, 2008. Several complaints against the Defendant were filed by the Plaintiff purportedly on behalf of Elaine Savoie on September 23, 2009 and October 18, 2009. Those complaints were also dismissed by the Labour Relations Board";

d. denying that "it has breached any legal duty it may have had to the Plaintiff or to Elaine Savoie";

e. denying "that it took any actions that were improper in its representation of Elaine Savoie"; and

f. denying "that it had any legal relationship whatsoever with the Plaintiff."

[5] The grounds of the Defendant's application for summary dismissal, set forth in its Notice of Application, are as follows:

a. "The Plaintiff's claims are without merit, and therefore the Defendant is entitled to summary judgment pursuant to Rule 7.3(1)(b) of the Alberta *Rules of Court*";

b. "The Plaintiff is not a proper party and does not have standing to bring this action";

c. "The Plaintiff has not pled facts that would support any cause of action.

(i) There is no merit to the Plaintiff's claim of breach of the duty of fair representation.

(ii) There is no merit to the Plaintiff's claim for civil fraud.

(iii) There is no merit to the Plaintiff's claim for fraudulent misrepresentation." ; and

d. "The Plaintiff's claims that arose before April 4, 2009 are barred by the *Limitations Act*, R.S.A. 2000, c. L-12 and should be dismissed."

Items b. through d. above are essentially the arguments of the Defendant as to why the Plaintiff's Claim is without merit.

[6] Rule 7.3 is contained in what is commonly referred to as the "new Rules of Court", which replaced the prior *Rules of Court* as at November 1, 2010. In the prior *Rules of Court*, it was Rule 159 that dealt with summary judgment. As set out by Mr. Justice Belzil in the case of *Mraiche Investment Corpration v. Gurbachan S. Paul et al.* [2011] A.J. No. 306, "it was common ground between the parties that although this rule is worded slightly differently from the previously existing Rule dealing with summary judgment applications, previous authorities on the subject are still

applicable." One of those leading "previous authorities" is *Murphy Oil Co. v. Predator Corp.* 2006 ABCA 69, wherein the Court of Appeal stated the following:

> "Summary judgment against a plaintiff, . . . will only be granted where there is no genuine issue for trial. It must be "plain and obvious" that the action cannot succeed: *Boudreault v. Barrett* (1998) 219 A.R. 67, 1998 ABCA 232 at para. 9; *Prefontaine v. Veale* (2003) 339 A.R. 340, 2003 ABCA 367 at para. 9."; and
>
> "The analysis of a summary judgment application is performed in two stages. In the first, the moving party must adduce evidence to show that there is no genuine issue for trial. Once the moving party has met that burden, the responding party may adduce evidence to persuade the court that there remains a genuine issue to be tried. It may choose to adduce no evidence, but then bears the risk that the judge will decide that the evidence adduced by the moving party has established that there is no genuine issue to be tried. See *Watts Estate v. Contact Canada Tourism Services Ltd.* (2000), 261 A.R. 66, 2000 ABCA 160 at para. 86; *Pioneer Exploration Inc. Estate (Trustee of) v. Euro-Am Pacific Enterprises Ltd.* (2003), 339 A.R. 165, 2003 ABCA 298 at para. 15; and *732311 Alberta Ltd. v. Paradise Bay Spa & Tub Warehouse Inc.* (2003), 339 A.R. 386, 2003 ABCA 362 at paras. 10-12."

[7] As set out earlier in this decision, the Plaintiff did not appear on this application and no Affidavit was filed by or on his behalf. Given the wording of Rule 7.3(1)(b) and the analysis that is required by the Court, I must determine, on the basis of the evidence of the Defendant, namely the Rigutto Affidavit, whether or not the Defendant has shown that there is no merit to the Plaintiff's claim or any part thereof.

[8] As one of the arguments of the Defendant is the standing of the Plaintiff to even bring the Claim, I will deal with that first.

[9] The Plaintiff has sued in his own name. As indicated earlier in this decision, the Plaintiff has pled that he holds a "valid Power of Attorney from Mrs. Elaine Savoie for dealing with and persuing [sic] her interests related to the Alberta Union of Provincial Employees". In order to be able to sue in his own name and on his own behalf, the Plaintiff must have his own cause of action against the Defendant, which, by the Plaintiff's own pleading and by the evidence, he clearly does not have. The cause of action against the Defendant, if any, is a cause of action that would belong to his wife. On that basis alone, I could dismiss the Plaintiff's Claim. However, I am mindful that the Plaintiff is not represented by Counsel and I expect that the Plaintiff is not well versed in the technicalities of the way in which he is supposed to describe himself if he is representing another party in an action, which would ordinarily be as a litigation representative.

[10] The *Provincial Court Act* does not provide for a litigation representative except with respect to a minor, and Mrs. Savoie is not a minor. The *Rules* do, however, contain provisions respecting litigation representatives.

[11] Rule 2.11 reads as follows:

> "2.11 The following individuals or estates **must have** a litigation representative to bring or defend an action or to continue or to participate in an action, or for an action to be brought or to be continued against them:
>
> (a) an individual under 18 years of age;
>
> (b) an individual declared to be a missing person under section 7 of the *Public Trustee Act*;
>
> (c) an adult who, in respect of matters relating to a claim in an action, lacks capacity, as defined in the *Adult Guardianship and Trusteeship Act*, to make decisions;
>
> (d) an individual who is a represented adult under the *Adult Guardianship and Trusteeship Act* in respect of whom no person is appointed to make a decision about a claim;
>
> (e) an estate for which no personal representative has obtained a grant under the *Surrogate* Rules (AR 130/95) and that has an interest in a claim or intended claim."

[emphasis mine]. Mrs. Savoie does not, on the evidence before me, fall into any of the categories outlined in Rule 2.11 and therefore, the Plaintiff cannot rely upon Rule 2.11 to allow him to be her litigation representative.

[12] Rule 2.12 reads, in part, as follows:

> "2.12(1) There are 3 types of litigation representatives under these rules:
>
> (a) an automatic litigation representative described in rule 2.13;
>
> (b) a self-appointed litigation representative under rule 2.14;
>
> (c) a Court-appointed litigation representative under rule 2.15."

[13] The Plaintiff has not been appointed by the Court as Mrs. Savoie's litigation representative and so Rule 2.12(c) would not apply to the case before me. The Plaintiff cannot be a self-appointed representative pursuant to Rule 2.12(b) as a self-appointed representative is, as set out in Rule 2.14, only applicable to ". . . an individual . . . who is required to have a litigation representative under rule 2.11" and Mrs. Savoie does not, as I set out above, fall into any of the categories outlined in Rule 2.11.

[14] That leaves only the possibility of the Plaintiff being an automatic litigation representative as set out in Rule 2.13, which reads as follows:

> "2.13 A person **is** a litigation representative under these rules if the person has authority to commence, compromise, settle or defend a claim on behalf of an individual or estate under any of the following:
>
> (a) an enactment;
>
> (b) an instrument authorized by an enactment;
>
> (c) an order authorized under an enactment;
>
> (d) a grant or an order under the *Surrogate Rules* (AR 130/95);
>
> (e) **an instrument**, other than a will, **made by a person, including, without limitation, a power of attorney** or a trust."

[emphasis mine]. This Rule appears to specifically allow the Plaintiff to be a litigation representative pursuant to a power of attorney. The power of attorney upon which the Plaintiff relies as giving him authority to commence this action, is attached to the Rigutto Affidavit as exhibit 2. It is titled "General Power of Attorney" and appears to have been prepared by a barrister and solicitor in the Province of Alberta.

[15] There is some suggestion in the Rigutto Affidavit that there may be a subsequent enduring power of attorney executed by Mrs. Savoie that revoked the general power of attorney referred to above. That suggestion is solely based on the following exchange set out in a cross-examination of an Affidavit sworn by the Plaintiff, not in these proceedings, attached to the Rigutto Affidavit as exhibit 1:

> "Question: Do you know if you and Elaine Savoie had done a document at the same time as your will called an "enduring power of attorney"?
>
> Answer: You know, that sounds familiar. I don't know for sure, but it does sound familiar."

It does not appear that the Plaintiff was asked to produce the enduring power of attorney and it further does not appear that he was pressed on this issue. Consequently, I am proceeding on the basis that the "General Power of Attorney" referenced above is the power of attorney at issue.

[16] In the body of the "General Power of Attorney", the Plaintiff's wife appoints the Plaintiff as her "true and lawful attorney for me, and in my name on my behalf and for my sole and exclusive use and benefit, to . . . sue for . . . all and every sum or sums of money . . which now are or is, or which shall or may hereafter appear to be due, owing payable or belonging to me . . . ". That wording is, in my opinion, broad enough to allow the Plaintiff to commence the within action as an automatic litigation representative, pursuant to Rules 2.12(1)(a) and 2.13(e).

[17] Counsel for the Defendant argues that a person can only become an automatic litigation representative under Rule 2.13 for a person set out in Rule 2.11. That argument was accepted by Mr. Justice Lee in the case of *Karen Nahirney v. Ogilvie & Company, Barristers & Solicitors, et al.* [2011] A.J. No. 1354, for the following reasons:

> "Rule 2.13(e) allows a person to become an automatic litigation representative by virtue of having an instrument such as a power of attorney, however the Rule should only apply to instances in which a litigation representative is required to be appointed. If the result of Rule 2.13(e) was to allow anyone to appoint a non-lawyer as their de-facto representative in court, then s. 106 of the *Legal Profession Act* would be rendered meaningless."

[18] Mr. Justice Lee found that there was a conflict between the *Rules* and section 106 of the *Legal Profession Act*, R.S.A. 2000, c. L-8, (the *"Legal Profession Act"*), with the result that section 106 must prevail. Rule 1.9 reads as follows:

> "1.9 Except as expressly provided, if there is a conflict or inconsistency between these rules and an enactment, the enactment prevails to the extent of the conflict or inconsistency."

[19] Section 106 of the *Legal Profession Act* reads, in part, as follows:

> "106(1) No person shall, unless the person is an active member of the Society,
>
> (a) practise as a barrister or as a solicitor;
> (b) act as a barrister or as a solicitor in any court of civil or criminal jurisdiction,
> (c) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person, or
> (d) settle or negotiate in any way for the settlement of any claim for loss or damage founded in tort."

[20] However, pursuant to subsection 106(2) of the *Legal Profession Act*, subsection (1) "does not apply to . . . a person permitted by statute to appear as the agent of another person before . . . the Provincial Court or a provincial judge in respect of services provided by that person as an agent". In the *Provincial Court Act*, section 62(1)(b) specifically allows "a person . . . to be represented by . . . an agent" in respect of civil proceedings. As a result, I find that the decision of Mr. Justice Lee is limited to civil proceedings in the Court of Queen's Bench and there is nothing to prevent the Plaintiff from being, in the Provincial Court, Civil Division, an automatic litigation representative for his wife pursuant to the power of attorney described above. I will not summarily dismiss the Claim due to the Plaintiff not having properly described himself in the style of cause as the litigation representative for his wife. He is the *de facto* litigation representative and will be considered to be so on a go-forward basis in this action. Consequently, that portion of the Defendant's argument fails.

[21] I now turn to another argument of the Defendant, that being limitations. The Defendant submits that the Plaintiff's Claim is statute-barred pursuant to the provisions of the *Limitations Act*, R.S.A. 2000, c. L-12 (the *"Limitations Act"*). Section 3(1) of the *Limitations Act* reads as follows:

"3(1) Subject to section 11, if a claimant does not seek a remedial order within

(a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

or

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim."

[22] The Plaintiff commenced the action by filing the Claim on October 4, 2011 and the Claim sets out that "the Claim arose at Calgary, Alberta, on or about October 23, 2010". On the face of it, if the "injury" did indeed arise on or about October 23, 2010, then the Claim, having been filed on October 4, 2011, was filed within the 2 year period prescribed by the *Limitations Act*. However, one must look at the underlying facts to determine when the "injury " actually arose so as to properly determine whether or not the Claim has been filed within the applicable 2 year period.

[23] The grievance history of Mrs. Savoie is set out in the Rigutto Affidavit. The relevant dates and events are as follows:

a. February 4, 2008 - Mrs. Savoie files a grievance with the Defendant, grievance #08 844503, stating "The Employer has allowed a harassment situation to develop and continue. This has adversely affected my health, my ability to work and my reputation at the University.";

b. February 15, 2008 - Mrs. Savoie files a grievance with the Defendant, grievance #08 844555, stating "On February 4, 2008, I was made aware that my wages would be red circled.";

c. March 17, 2008 - Mrs. Savoie files a grievance with the Defendant, grievance #08 844620, stating "On March 10, 2008 I received a Letter of Discipline.";

d. May 12, 2008 - Mrs. Savoie files a grievance with the Defendant, grievance #08 844776, stating "On May 6, 2008, I received a Letter of Expectation that was unwarranted.".

All four grievances were then referred to arbitration by way of letters sent by the Defendant to the University of Calgary (the "Employer"). Two of the letters were dated September 9, 2008 and two of the letters were dated September 16, 2008. The Defendant commenced its preparation for the arbitration, which included attempts at settling the matters with Mrs. Savoie and her Employer. These settlement attempts continued through to at least November 29, 2009 according to the Rigutto Affidavit (paragraph 50). Ultimately, no settlement was reached.

[24] On November 5, 2009, while these settlement attempts were still ongoing, the Defendant sent a letter to Mrs. Savoie, the body of which read as follows:

> "This is to advise that the Union's Grievance Review Board will be reviewing your file on November 18 or 19, 2009. The purpose of this review is to determine whether the Union will be proceeding with your Grievance. The Board will review a complete case summary and recommendation from the Disputes & Arbitrations Department (copy of summary enclosed). If you wish to make a written submission to the Board please contact Ashley Brandt at 780-930-3327 or by email at a.brandt@aupe.org. Also, if you would like to request to appear in front of the Board, please also contact Ashley Brandt no later than Monday, November 16, 2009. If you require further information regarding your grievance please contact your Membership Services Officer/Union Representative at the phone number shown below.
>
> Enclosed for your information, is a copy of the Terms of Reference for the Grievance Review Board."

[25] Neither the Plaintiff nor Mrs. Savoie attended before the Grievance Review Board. The Defendant sent a letter dated November 19, 2009, to Mrs. Savoie, the body of which read as follows:

> "Please find attached a letter from the University of Calgary dated November 19, 2009 that reiterates the offer of settlement that was communicated to you several months ago. You will note that in the attached letter the Employer indicates that the offer remains open for acceptance until 4:30 PM on November 30, 2009.
>
> On November 18, 2009 the AUPE Grievance Review Board examined your cases in detail and came to the conclusion that the attached offer constitutes the best possible resolution of your grievances and that any arbitration award would most likely be inferior to the attached offer. You were advised that the said review would take place and were invited to attend in order to submit your representations. You did not attend.
>
> Unless we receive your signed acceptance of the attached offer by no later than 10:00 AM on November 30, 2009 your grievance files will be re-submitted to the AUPE Grievance Review Board for a final determination. Furthermore, please be hereby advised that in light of the above the undersigned has been authorized to request and obtain an adjournment of the arbitration hearing scheduled for December 10, 11 and 18, 2009.
>
> Should you have any questions or comments, please do not hesitate to communicate with the

undersigned."

[26] After receipt of the November 19, 2009 letter referenced above, the Plaintiff advised the Defendant that the offer referred to therein was not acceptable. The Defendant sent a further letter dated December 3, 2009, to Mrs. Savoie, the body of which read as follows:

> "This is to advise that the Union's Grievance Review Board will be reviewing your file on December 17, 2009. The purpose of this review is to determine whether the Union will be proceeding with your Grievance. The Board will review a complete case summary and recommendation from the Disputes & Arbitration Department (copy of summary enclosed). If you wish to make a written submission to the Board please contact Ashley Brandt at 780-930-3327 or by email at a.brandt@aupe.org. Also, if you would like to request to appear in front of the Board, please also contact Ashley Brandt no later than December 15, 2009. If you require further information regarding your grievance please contact your Membership Services Officer/Union Representative at the phone number shown below.
>
> Enclosed for your information, is a copy of the Terms of Reference for the Grievance Review Board."

[27] This appears to be essentially the same letter as the November 5, 2009, letter that was sent to Mrs. Savoie as outlined above. Again, neither the Plaintiff nor Mrs. Savoie attended before the Grievance Review Board on December 17, 2009 and the decision of the Board, as set out in its letter dated December 218, 2009, to Mrs. Savoie, was as follows:

> "After careful consideration it was the unanimous decision of the Grievance Review Board to withdraw your grievances from arbitration. A review of the facts confirms that the subject matters of these grievances would not be successful at arbitration.
>
> <u>As this decision is final and binding, we are closing our file.</u>"

[emphasis mine]. This letter was sent to Mrs. Savoie by registered mail and appears to have been received by the Plaintiff on December 7, 2009. So, as at that date, it was first made known to the Plaintiff and Mrs. Savoie that there would be no arbitration of the grievances. Up until that date, settlement discussions had been ongoing and the Plaintiff and Mrs. Savoie did not know that the Defendant would not proceed with the arbitration of the grievances. In other words, the "injury" of which the Plaintiff complains, namely the breach of the duty of fair representation, was made known to the Plaintiff on December 7, 2009, and it warranted bringing a proceeding as at that date. As the Claim was filed on April 4, 2011, I find that the Plaintiff did seek a remedial order within the 2 year time period set forth in the *Limitations Act.* Consequently, I will not summarily dismiss the Claim and that portion of the Defendant's argument fails.

[28] The final argument of the Defendant is that "the Plaintiff has not pled facts that would support any cause of action", those causes of action being described by the Defendant as:

a. breach of the duty of fair representation;

b. civil fraud; and

c. fraudulent misrepresentation.

[29] The Claim does not actually specify what cause of action the Plaintiff is relying upon. The Plaintiff uses the words "deceit", "coercion" and "intimidation" with respect to the actions of the Defendant. The Plaintiff does not use the word "fraud" in the Claim. Deceit is a tort but coercion and intimidation are not. The Plaintiff's claim is, as best as can be ascertained by the wording of the Claim a complaint that the Defendant did not take the grievances to arbitration. That is, essentially, a claim that the Defendant breached its duty of fair representation. However, I will first address the Plaintiff's claim of "deceit".

[30] As stated by Madam Justice Phillips in the case of *Radhakrishnan v. University of Calgary Faculty Assn. (c.o.b. TUCFA)* [1999] A.J. No. 1088 (Q.B.), aff'd [2002] A.J. No. 961 (C.A.), "a deceit is also known as a fraudulent misrepresentation. The claim for deceit and fraudulent misrepresentation, has as its basis similar circumstances as the claim for fraud." Further, as set out in the text, *The Law of Torts* by Philip H. Osborne:

> "Deceit requires the proof of fraud. A fraudulent misrepresentation is one that the representor either knows is untrue or is consciously reckless as to whether it is true or false. The common thread is that . . . the defendant has no honest belief in the truth of the statement."; and
>
> "Deceit is established whenever a person has made a fraudulent statement that intentionally causes another person to rely on it to her detriment."; and
>
> "There are four essential elements to an action in deceit: misrepresentation, fraud, reliance and damage."; and
>
> "The misrepresentation must be made fraudulently."; and
>
> "The plaintiff must prove actual damage caused by reliance on the fraudulent misrepresentation".

[31] The "deceit" alleged to have occurred in the case before me is, as set out in the Civil Claim, that the Defendant "notified Mrs. Savoie in writing that the grievances would be taken to arbitration", which ultimately did not occur. In order to succeed in the claim for deceit, the Plaintiff must prove that that statement was either untrue or that it was made recklessly, without regard as to whether it was true or not. There is nothing in the Rigutto Affidavit to indicate that the Defendant lied when it advised Mrs. Savoie that it was going to take her grievances to arbitration. Further, there is nothing in the Rigutto Affidavit to indicate that the Defendant was reckless in advising Mrs. Savoie that her grievances would be taken to arbitration. The evidence is that the Defendant was preparing for the arbitration and it was only after two Grievance Review Board hearings, neither of which the Plaintiff nor Mrs. Savoie chose to attend, that the Defendant determined not to proceed

with the arbitration. Consequently, I find that there is no merit to the Plaintiff's claim of deceit and summarily dismiss that portion of the Plaintiff's claim.

[32] This leaves the Plaintiff's final claim of breach of duty of fair representation to deal with and the Defendant's argument that there is no merit to that portion of the Plaintiff's claim.

[33] The Rigutto Affidavit sets out the following in paragraphs 7 through 9 and paragraphs 11 and 12, namely:

> "7. Elaine Savoie was an employee of the University of Calgary (the "Employer" from January 1997 until approximately August 2009.
>
> 8. The Defendant, AUPE is a trade union which is the collective bargaining agent acting on behalf of many groups of workers, including the support staff of the University of Calgary.
>
> 9. AUPE was, at all relevant times, the sole bargaining agent for Elaine Savoie and other employees of the University of Calgary pursuant to section 74(2) of the *Public Service Employee Relations Act,* R.S.A. 2000, c. P-43 ("*PSERA*"), whereby AUPE is deemed to be the certified bargaining agent for a bargaining unit described as "All employees when employed in general support services." AUPE had exclusive power to act as bargaining agent for its members. Attached to this my affidavit and marked Exhibit 5 is the relevant excerpt of the Collective Agreement between the AUPE and the Governors of the University of Calgary, for the period March 1, 2008 - March 31, 2010 ("Collective Agreement").
>
> 11. The terms and conditions of employment in the employ of the University of Calgary are governed by the *Public Service Employee Relations Act, supra,* and by the Collective Agreement entered into by the University of Calgary and AUPE.
>
> 12. Article 14.02 of the Collective Agreement (Exhibit 5) states:
>
> 14.02 In the event that a difference arises between the Parties hereto or any person bound by this Agreement regarding:
>
> (a) alleged unjust treatment;
>
> (b) alleged unfair working conditions;
>
> (c) the termination of a Casual, Temporary, Student or Probationary employee;
>
> (d) alleged sexual harassment;

> (e) any disciplinary action without just cause, or the application, interpretation, or any alleged violation of this Agreement;
>
> the alleged difference must be dealt with progressively in the following manner without stoppage of work or refusal to perform work except as provided pursuant to the Occupational Health and Safety act in respect of an imminent danger to the health or safety of the Employee.
>
> Differences concerning matters referred to in paragraphs (a), (b), or (c) above shall not be submitted to Adjudication. Differences concerning matters referred to in paragraph (d) and (e) above may be referred to Adjudication."

[34] There can be a statutory duty of fair representation, however, the evidence before the Court is that Mrs. Savoie's employment was governed by the *Public Service Employee Relations Act*, R.S.A. 2000, c. P-43 ("*PSERA*") and there is no duty of fair representation set out in *PSERA*. The Plaintiff was made aware of this on numerous occasions by the Alberta Labour Relations Board, as set out in the Rigutto Affidavit. The Alberta Labour Relations Board advised the Plaintiff that it had "no jurisdiction under *PSERA* to address [Mrs. Savoie's] concerns with the fairness of the [Defendant's] representation and the proper forum to have those concerns addressed is in court." (see, by way of one example, exhibit 40). Consequently, the Plaintiff is left to claim that the Defendant has breached a common law duty of fair representation.

[35] The Supreme Court of Canada, in *Canadian Merchant Service Guild v. Gagnon et al,* [1984] 1 S.C.R. 509 ("*Canadian Merchant Guild*"), set out that "the duty of representation arises out of the exclusive power given to a union to act as a spokesman for the employees in a bargaining unit" and that:

> "The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.
>
> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

[36] In *Joseph v. The Alberta Union of Provincial Employees*, [2004] A.J. No. 1560 (Q.B.), ("*Joseph*"), Madam Justice Veit had occasion to deal with a summary judgment application by the same union that is before the Court in the within action, arising out of a claim by an employee for breach of the duty of fair representation. She found that a certain portion of the Plaintiff's claim with respect to some of the grievances was statute-barred, and summary dismissal was therefore granted as to those grievances. She also found that the Plaintiff's claim with respect to the one remaining grievance that was not statute-barred, did "not relate to rights arising from the collective agreement" and as a result, "in the circumstances, AUPE owed no common law duty of fair representation to Mr. Joseph" and summarily dismissed his claim.

[37] In the case before me, as is outlined above, there were four grievances filed by Mrs. Savoie. In summary, those grievances were for:

a. "a harassment situation";

b. "my wages would be red circled";

c. "a Letter of Discipline"; and

d. "a Letter of Expectation that was unwarranted."

I accept the argument of Counsel for the Defendant that the grievance for "a harassment situation" would fall under the category of "alleged unjust treatment" in the Collective Agreement and pursuant to the provisions of the Collective Agreement, such a "difference . . . shall not be submitted to Adjudication." As a result, and as set out in *Joseph*, since "the dispute on which the claim is based does not relate to rights arising from the collective agreement", the Defendant does not owe Mrs. Savoie any common law duty of fair representation with respect to this grievance. Consequently, I find that there is no merit to this portion of the Plaintiff's Claim and summarily dismiss that portion of the Plaintiff's Claim that relates to the "harassment situation" grievance.

[38] That leaves the three other grievances to deal with. These grievances appear to fall under the category in the Collective Agreement of "disciplinary action" and, pursuant to the Collective Agreement, <u>may</u> be referred to Adjudication [emphasis mine]. According to the Rigutto Affidavit, the Defendant "began preparing for the arbitration and initiating settlement discussions" between Mrs. Savoie and her employer. The chronology of events is as follows:

a. November 19, 2008 - Debbie Kay, on behalf of the Defendant, receives a fax from Mrs. Savoie outlining her position vis-a-vis settlement. The amount that Mrs. Savoie is seeking from her Employer is $411,500.00, which amount is additional to what she says is her "rightful eight month redeployment package as per the AUPE Collective

Agreement". The particulars as to how Mrs. Savoie arrives at the sum of $411,500.00 are set out in her fax (exhibit 11);

b. November 24, 2008 - Ms. Kay had contacted the Employer and sent a letter to Mrs. Savoie advising her that her Employer had rejected her settlement proposal, but included in the letter the Employer's possible counter-offer;

c. December 16, 2008 - Mrs. Savoie sends an e-mail to Ms. Kay rejecting the Employer's proposals;

d. December 18, 2008 - Ms. Kay sends Mrs. Savoie an e-mail asking if Mrs. Savoie has a counter-offer to make. Ms. Kay advises Mrs. Savoie that she will be able to meet with Mrs. Savoie in the Calgary office of the Defendant to prepare for the arbitration;

e. January 9, 2009 - Ms. Kay sends an e-mail to Mrs. Savoie confirming the meeting they had "on Tuesday of this week" and advising her she"will continue to discuss [her] file with the University and . . . advise if any offers come up";

f. March 2, 2009 - telephone discussion between Ms. Kay and Mrs. Savoie, pursuant to which Mrs. Savoie sends an e-mail to Ms. Kay, on May 10, 2009, advising her that she is "not prepared to discuss any further settlement offers from the University of Calgary" and wants the grievances to proceed to arbitration;

g. March 12, 2009 - Ms. Kay sends an e-mail to Mrs. Savoie advising her than "an arbitrator has now been agreed upon" and that she will contact Mrs. Savoie once they have dates for the arbitration so as to confirm the availability of Mrs. Savoie. She also advises that she "will reject the University's offer of settlement and proceed to arbitration";

h. March 13, 2009 - telephone discussion between Ms. Kay and Mrs. Savoie pursuant to which Mrs. Savoie sends an e-mail to Ms. Kay on March 17, 2009, giving her a list of individuals "who played a role in all or some of the grievances that I have filed." There are sixteen (16) individuals so named;

i. March 17, 2009 - Ms. Kay sends an e-mail to Mrs. Savoie asking for some clarification respecting the individuals and advising her that "I will contact you once dates for the Arbitration have been set and I am ready to begin preparation for your hearing";

j. July 7, 2009 - Ms. Kay sends an e-mail to Mrs. Savoie outlining an offer received from the Employer. The offer is described in the e-mail and Ms. Kay indicates that, in her opinion, "the offer is very reasonable and very generous to include the tuition fee waiver for your son that you requested". Ms. Kay advises Ms. Savoie that she will be away on vacation "from July 9 - 20 and in [her] absence, Bill Rigutto will be available . . . to discuss this offer with you . . . ";

k. September 24, 2009 - telephone discussion between the Plaintiff and William Rigutto, pursuant to which the Plaintiff sent Mr. Rigutto an e-mail that accepts the Employer's offer as set out in Ms. Kay's e-mail dated July 7, 2009 "together with a payment from the union of $50,000.00";

l. November 5, 2009 - Jaime Oyarzun, on behalf of the Defendant, sends Mrs. Savoie a letter advising her "that the Union's Grievance Review Board will be reviewing your file on November 18 or 19, 2009" and that "The purpose of this review is to determine whether the Union will be proceeding with your Grievance." Mrs. Savoie was provided with a copy of the "complete case summary and recommendation from the Disputes & Arbitration Department". She was asked if she wanted "to make a written submission to the Board" or to appear before the Board and if she did, to contact "Ashley Brandt no later than Monday, November 16, 2009." Contact information for Ms. Brandt was set out in the letter. The Grievance Review Board Summary is appended to this decision as Appendix "A";

m. November 13, 2009 - telephone discussion between the Plaintiff and Ms. Brandt, pursuant to which the Plaintiff sends a follow-up e-mail to Ms. Brandt advising her that Mrs. Savoie will not be attending before the Grievance Review Board;

n. November 15, 2009 - the Plaintiff sends a letter to the attention of Mr. Oyarzun taking "exception to the list of facts that are included with the Grievance Review Board Summary" and indicating that the "Union has already committed [the] grievances to arbitration", noting that the arbitration has been scheduled for December 12, 13 and 18, 2009.

n. November 19, 2009 - Mr. Rigutto sends a letter to Mrs. Savoie forwarding a letter dated November 19, 2009, that he had received from the University of Calgary, which contained their "best and final offer". Mr. Rigutto advises Mrs. Savoie that "the AUPE Grievance Review Board examined your cases in detail and came to the conclusion that the attached offer constitutes the best possible resolution of your grievances and that any arbitration award would most likely be inferior to the attached offer. You were advised that the said review would take place and were invited to attend in order to submit your representations. You did not attend." Mr. Rigutto goes on to advise Mrs. Savoie that if she does not accept the offer, there will be another review by the Grievance Review Board and its determination will be final. Mr. Rigutto further advises that there will be an adjournment of the scheduled arbitration hearing;

o. November 29, 2009 - the Plaintiff sends a letter to the attention of Mr. Oyarzun advising him that the "offer of settlement from the University is acceptable to Mrs. Savoie provided the AUPE add $100,000.00 to the amount of the University's offer.";

p. December 3, 2009 - Mr. Oyarzun sends a letter to Mrs. Savoie a letter advising her "that the Union's Grievance Review Board will be reviewing your file on December 17, 2009" and that "The purpose of this review is to determine whether the Union will be proceeding with your Grievance." Mrs. Savoie was once again provided with a copy of the "complete case summary and recommendation from the Disputes & Arbitration Department" (see Appendix "A"). Neither the Plaintiff nor Mrs. Savoie contacted the Defendant to advise as to whether or not they would be attending before the Grievance Review Board and they did not in fact attend before the Board on December 17, 2009;

q. December 18, 2009 - the Defendant sends a letter to Mrs. Savoie advising her that the Grievance Review Board met on December 17, 2009 and that, "after careful consideration it was the unanimous decision of the Grievance Review Board to withdraw your grievances from arbitration. A review of the facts confirms that the subject matters of these grievances would not be successful at arbitration. As this decision is final and binding, we are closing our file."

[39] With respect to the Grievance Review Board Summary, the following is noted:

a. as to grievance #08 844555, "the Employer was prepared to concede the point and compensate the Grievor for increases and increments of which he had been deprived after being transferred to the Olympic Oval at the lower paying position", which would constitute a "full resolution" of this grievance;

b. as to grievance #08 844620, the Employer had agreed to the "removal of the Letter of Discipline and clearing of the file", which would have resolved this grievance;

c. as to grievance #08 844776, the Employer had agreed to the "removal of the Letter of Expectation", which would have resolved this grievance.

d. that, "in addition to the 8 months redeployment of which [Mrs. Savoie] has already benefited [sic] the Employer offered 4 months salary from the end of the employment relationship and a tuition fee waiver for the Grievor's son for one year after the end of her employment";

e. "the Employer has granted all of the grievances except the one based upon harassment. In addition the Employer has added to its offer an additional four months severance and one year of free tuition for the Grievor's son". With respect to the harassment grievance, as I have already indicated above, and as is set out in the Grievance Review Board Summary, "the harassment grievance is precluded from arbitration";

[40] Under the heading of "Analysis" in the Grievance Review Board Summary, it goes on to state the following:

a. "The interests of the Grievor and the Union are better served by accepting a very good offer in the circumstances of this case and disregarding what can only be characterized as an unreasonable and unrealistic position on the part of the Grievor:"

b. "If the Offer is not accepted and the Union proceeds to arbitration, it is likely that the result will be less favourable than the offer since the Employer's offer of an additional 4 months severance and tuition waiver will be withdrawn and will not likely be included in even the most positive award."

c. "Union Counsel has made every effort to advise the Grievor that the offer of settlement is in her best interests and that the offer is indeed reasonable and fair."; and,

d. "The Employer has granted 3 of the 4 grievances by way of the settlement offer and preliminary objections regarding the arbitrability of the harassment grievance may be successful. Union Counsel advised the Grievor at the outset that the harassment grievance would be taken forward only if the other 3 grievances went to arbitration in order to give an Arbitration Board evidence of the whole matter from the beginning."

[41] Under the heading of "Recommendation", the Grievance Review Board Summary sets out the following:

> "The Union need not take every grievance to arbitration (*Loutan* v. *Alberta Union of Provincial Employees* [2002] A.J. No. 336 (Q.B.) para. 24).
>
> The Union has the authority to determine whether a grievance should proceed to arbitration and, as a matter of policy, is entitled to consider the following:
>
> (a) The merits of the grievance;
> (b) The chances of success at arbitration;
> (c) The significance of the issue;
> (d) The costs of the arbitration process; and
> (e) The effect of an arbitral award on other employees.
>
> After consideration of the facts and arbitral jurisprudence, it is the opinion of the Union that this grievance should not be conveyed to arbitration. Instead, the Grievor should be advised that if she does not accept the above described offer of settlement made by the Employer, the grievances will be withdrawn by the Union."

[42] Once the grievances were referred to arbitration in September 2008, the evidence reveals that the Defendant actively proceeded to both try to resolve the grievances and prepare the grievances for arbitration, all the while keeping the Plaintiff and Mrs. Savoie fully informed of the steps that were being taken by the Defendant on Mrs. Savoie's behalf. I have set out these steps in detail in paragraph 38 above. There is nothing in any of the dealings between the parties as set out in the

Rigutto Affidavit to indicate that those dealings were anything but cordial and professional. Once the Employer provided an offer which effectively not only resolved the grievances but, in the opinion of the Defendant, provided an even better resolution than Mrs. Savoie could achieve at an arbitration, the Plaintiff and Mrs. Savoie were provided with not one, but two opportunities, to submit their position in writing or attend at the Grievance Review Board hearings, or both, and chose to do nothing. The Grievance Review Board Summary, to which I have both referred in this decision and attached as an Appendix to this decision, clearly sets out that the Defendant undertook a detailed analysis of the grievances, and determined, after not one, but two hearings, that Mrs. Savoie would not get a better resolution of her grievances at arbitration and in fact, would likely not do as well as the final offer made by her Employer.

[43] So, applying the principles set out in *Canadian Merchant Guild* to the case before me, there is no evidence to suggest that the discretion of the Defendant, as it was not required in the Collective Agreement to take the grievances to arbitration, was exercised in any way other than "in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and its consequences for the employee on the one hand and the legitimate interests of the union on the other." Furthermore, there is no evidence to suggest that the Defendant's decision not to proceed with arbitration was "arbitrary, capricious, discriminatory or wrongful." In addition, the representation by the Defendant was "fair, genuine and not merely apparent" and was "undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee." As a result, on the basis of the evidence before me, there is no merit to the Plaintiff's Claim that the Defendant breached its duty of fair representation and consequently, the Defendant succeeds in its application for summary judgment, with the result that the Plaintiff's Claim is dismissed.

[44] With respect to costs of the application, the Defendant did, in its written argument, seek costs and requested that those costs be on a "solicitor/client basis" given the allegation of "deceit" made by the Plaintiff. Pursuant to section 9.8 of the *Provincial Court Act*, "the Court may . . . in any proceedings . . . and on any conditions that the Court considers proper award costs . . . ". Although the Plaintiff did use the word "deceit" in the Civil Claim, he was, as a lay person and self-represented litigant, likely unaware that such an allegation, if unfounded, as is the case here, may attract an award of greater costs, than might otherwise be the case.

[45] I am mindful of the comments of my brother Judge, the Honourable A.A. Fradsham in *John Alexander Davis v. 850015 Alberta Ltd. et al.* [2003] A.J. No. 428 when he stated that "when making an award of costs in Provincial Court, the judge should remember the purpose of the court as a forum for resolving civil disputes" and that "its purpose [is] . . . to provide a relatively inexpensive means of resolving disputes involving amounts within the court's jurisdiction". Furthermore, as was set out by Madam Justice J.M. Ross in *Alberta Treasury Branches v. Valerio* [2011] A.J. No. 1352, "solicitor and client costs are not to be automatically ordered on unproven allegations of impropriety" and that "unproven allegations of misconduct may attract higher costs, but these costs will not necessarily rise to the level of solicitor-client costs" as, "ultimately, each case is to be decided on its own facts and requires discretion to be exercised judicially by the trial judge."

[46] The Defendant has succeeded in its application for summary dismissal of the Plaintiff's Claim, although it was unopposed in that application as the Plaintiff did not appear on the application nor did anyone appear on his behalf. Pursuant to the Court's "guideline for costs in Provincial Court - Civil Division" matters, which has been referred to in numerous decisions of this Court, a successful litigant, when represented by Counsel, would, on an *ex-parte* application, be awarded costs of $75.00 and on an opposed application, be awarded costs of $150.00. These guidelines though date back to 2001. Also, in the case before me, the Defendant filed not only the Rigutto Affidavit, but also a Written Brief and a Book of Authorities, which were detailed and of great assistance to the Court. Counsel for the Defendant also spent a considerable amount of time at the application outlining the facts of the within matter and setting forth his argument for summary dismissal, with reference to the applicable case law, which was also very useful given the complexity of this case. In taking all of this into account, including the comments of Judge Fradsham and Justice Ross, I award costs to the Defendant in the sum of $750.00.

[47] In conclusion, the Plaintiff's Claim is dismissed with costs awarded to the Defendant in the sum of $750.00.

Heard on the 20th day of December, 2011.

Dated at the City of Edmonton, Alberta this 31st day of January, 2012.

L.D. Young
A Judge of the Provincial Court of Alberta

Appearances:

No appearance by the Plaintiff

Simon Renouf, Q.C.
Solicitor for the Defendant

APPENDIX "A"

Grievance Review Board Summary

844503 (Harassment), 844555 (Improper Pay), 844620 (Letter of Discipline), 844776 (Letter of Expectation)

Date Written: September 2009

This is Exhibit "20" referred to in the Affidavit of William Rigutto
Sworn before me this 2 day of November A.D. 2011
Jacqueline Bunn
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
Jacqueline Bunn
Commission Expires November 10, 2013

GRIEVOR'S INFORMATION:

Position: SA 3
Length of Service: 11 years
Employer: University of Calgary
Previous Discipline: None

COLLECTIVE AGREEMENT:

Between University of Calgary and AUPE, Local 095.

FACTS:

1) The Grievor, an eleven plus year employee with the Faculty of Kinesiology as a Financial Business Officer with an outstanding performance record has filed four grievances stemming, directly and indirectly from incidents which took place in October 2007;
2) On October 19, 2007 a budget meeting took place at the Faculty of Kinesiology in which Terry Lockhart, Budget Officer, and the Grievor were present to discuss the budget plan for the Athletics Department for the up-coming year;
3) During that meeting, there was discussion surrounding staff costs and the Grievor had indicated that the reason there was no line item in the budget plan for staff costs was that her area was paying the announcers and officials with cash at the end of each game;
4) On October 22, Lockhart asked the Grievor to meet him over a coffee to discuss various matters. During that meeting, the Grievor explained to Lockhart that her department was in fact paying people in cash;
5) Lockhart allegedly accused the Grievor of fraud and continually asked the Grievor who was responsible for such practice. This meeting to place in a public place (the University's main food court) without the benefit of union representation or advance notice of the reason for the meeting;
6) On October 23 the Grievor was instructed to attend a meeting with the Assistant Dean of Kinesiology. When asked what the meeting would be about, no answer was given. Following that meeting, the Grievor was called at home later that evening by the Assistant Dean and questioned further;
7) An investigation into the cash payments practice was commenced. During such investigation, on October 24, the Employer suspended the director of the department and prevented computer access to Peoplesoft for the rest of the staff, including the Grievor, the whole without advance warning;

Exhibit No. 15, Aug. 19, 2010
Exam of Richard Savoie
Deanna M. Di Paolo
Official Court Reporter

8) On November 6, the Dean called a staff meeting at which time the Grievor and the rest of the staff were advised that no fraud had been found although the manager had been removed from his position;
9) On the same day the Grievor was ordered off work by her doctor until January 22, 2008 for a stress induced medical condition;
10) In December 2008 the Grievor's doctor advised that she would be cleared to return to work as of January 14, 2008 but that the Grievor's prognosis and success in returning to work would be much better if she were transferred into a different department and work environment;
11) On January 8, 2008 the Grievor was contacted by a member of the Staff Wellness Program and told that because the Grievor had been found to be at fault, there was no obligation to find the Grievor another position upon her return;
12) On January 11, 2008, a different member of the Staff Wellness Program called to say that the last call was an error and that there would be an offer of another position;
13) On January 18, 2008 during the return to work meeting the Grievor was offered a lower position working in the Olympic Oval under a new supervisor. The Employer indicated that this position would be red circled. In the alternative the Employer offered a severance package. The Grievor accepted the new position. At the end of the meeting the Grievor was told that a discipline letter was forthcoming;
14) By letter of discipline dated March 10, 2008, the Grievor is advised that while there was no finding of fraud, she and two others had been found to have breached university policy, the Income tax Act, The Employment Standards Act and the collective agreement;
15) On April 28, 2008, the Grievor received a Performance Expectation Letter advising her that she should be interacting with the Senior Financial Analyst, Terry Lockhart, and responding directly to him upon his requests for information or other instructions;
16) In November 2008 the Employer advised the Grievor that her position was being substantially modified. She was offered to either accept the newly modified position, redeployment of 8 months or a severance package. She chose to accept the redeployment;
17) The Grievor's position has generally been that the Employer has ruined her career and she has insisted that she should be entitled to damages amounting to over $400,000.00 as a result;
18) On July 7, 2009 Union Counsel advised the Grievor that the Employer had made the following offer to settle the grievances:
    a) Removal of the Letter of Expectation (resolving Grievance # 844776);
    b) Removal of the Letter of Discipline and clearing of the file (resolving Grievance # 844620);
    c) With respect to the improper pay grievance, the Employer was prepared to concede the point and compensate the Grievor for increases and increments of which she had been deprived after being transferred to the Olympic Oval at the lower paying position. This amount totals $ 6,700.00 (full resolution of Grievance # 844555);

d) In addition to the 8 months redeployment of which she has already benefited the Employer offered 4 months salary from the end of the employment relationship and a tuition fee waiver for the Grievor's son for one year after the end of her employment;
e) The Employer also welcomed the Grievor to apply for any positions that became available during her redeployment and beyond;

19) Union co-counsel was contacted by the Grievor through her spouse (who has a power of attorney on her behalf) and advised that the Grievor would only accept the Employer's offer if the Union paid to the Grievor an additional $ 50,000.00 in damages for allegedly failing to properly represent and advise the Grievor, particularly from October 2007 through March 2008. This position was confirmed by the Grievor in writing by way of the e mail attached hereto; and
20) In addition, on September 23, 2009, the Grievor filed a second Unfair Representation Complaint before the Labour Board, but this complaint has been rejected.

ANALYSIS

1) As can be noted from the above, the Employer has granted all of the grievances except the one based upon harassment. In addition the Employer has added to its offer an additional four months severance and one year of free tuition for the Grievor's son;
2) While it may be argued that the employer treated the Grievor poorly during the investigation into the money-handling policy, it is highly unlikely that the harassment grievance will be successful. Since the Collective agreement is silent with respect to "harassment" such conduct and complaint would come under the heading of "unjust treatment" or "unfair working conditions" as contemplated by Article 14.02 of the Collective Agreement which provides that ***"differences concerning matters referred to in paragraphs (a) (unjust treatment), (b) (unfair working conditions), or (c) above shall not be submitted to Adjudication (arbitration)."*** Thus the harassment grievance is precluded from arbitration;
3) Even if this matter could proceed to arbitration it is unlikely that the Grievor would get a better resolution than the one she would receive by way of the above offer;
4) The interests of the Grievor and the Union are better served by accepting a very good offer in the circumstances of this case and disregarding what can only be characterized as an unreasonable and unrealistic position on the part of the Grievor;
5) If the Offer is not accepted and the Union proceeds to arbitration, it is likely that the result will be less favourable than the offer since the Employer's offer of an additional 4 months severance and tuition waiver will be withdrawn and will not likely be included in even the most positive award; and
6) Union Counsel has made every effort to advise the Grievor that the offer of settlement is in her best interests and that the offer is indeed reasonable and fair. Awards of $ 50,000.00 to $ 400,000.00 for these types of grievances are highly unlikely. The Employer has granted 3 of the 4 grievances by way of the settlement offer and preliminary objections regarding the arbitrability of the

harassment grievance may be successful. Union Counsel advised the Grievor at the outset that the harassment grievance would be taken forward only if the other 3 grievances went to arbitration in order to give an Arbitration Board evidence of the whole matter from the beginning. Since there can be no better offer than the removal of the letter of discipline, letter of expectation and full payment of monies owing, the harassment grievance has no merit.

RECOMMENDATION

The Union need not take every grievance to arbitration (Loutan v. *Alberta Union of Provincial Employees* [2002] A.J. No. 336 (Q.B.) para. 24).

The Union has the authority to determine whether a grievance should proceed to arbitration and, as a matter of policy, is entitled to consider the following:

(a) The merits of the grievance;
(b) The chances of success at arbitration;
(c) The significance of the issue;
(d) The costs of the arbitration process; and
(e) The effect of an arbitral award on other employees.

After consideration of the facts and arbitral jurisprudence, it is the opinion of the Union that this grievance should not be conveyed to arbitration. Instead, the Grievor should be advised that if she does not accept the above described offer of settlement made by the Employer, the grievances will be withdrawn by the Union.